

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TRANSCRIPT OF MOTIONS HEARING/STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. EZRA

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Proceedings recorded by computerized stenography, transcript
produced by computer.

09:08:42 1 (Open court)

09:08:42 2 THE CLERK: AU:21-CV-751.

09:08:48 3 THE COURT: May we have appearances, please.

09:08:50 4 MR. KENDALL: Your Honor, Joe Kendall on behalf

09:08:52 5 of the plaintiffs. Along with me are my, not from

09:08:58 6 Cincinnati this morning, but from San Diego, Dan Drosman

09:09:03 7 or Kevin Lavelle, and Rachel Jensen. They're with

09:09:05 8 Robbins Geller Rudman & Dowd on behalf of the plaintiffs.

09:09:06 9 THE COURT: All right. And can I have

09:09:10 10 appearances for the movant.

09:09:14 11 MR. COSTA: For the defendant, Greg Costa.

09:09:18 12 Good to see you this morning.

09:09:19 13 THE COURT: Good to see you.

09:09:19 14 MR. COSTA: I'm joined by Monica Loseman,

09:09:21 15 Scott Campbell, and Lloyd Marshall.

09:09:23 16 THE COURT: All right. Now, before we move

09:09:28 17 forward, Mr. Costa, your firm has moved to withdraw in

09:09:37 18 this case. We have other counsel for the parties, and,

09:09:48 19 quite frankly, I can see no reason not to grant your

09:09:51 20 motion at this time.

09:09:52 21 MR. COSTA: Thank you, Your Honor. And we have

09:09:53 22 counsel for the individual defendants present here this

09:09:58 23 morning, if they want to introduce themselves.

09:10:00 24 MR. CLEVELAND: Good morning, Your Honor.

09:10:02 25 Shawn Cleveland for Lindsay Burns and Remi Barbier.

09:10:05 1 THE COURT: All right. So unless you would
09:10:07 2 like me to hold off and you wish to argue this morning, I
09:10:09 3 am more than happy to grant your motion at this time and
09:10:13 4 excuse you.

09:10:16 5 MR. COSTA: Well, we're still representing the
09:10:18 6 company --

09:10:18 7 THE COURT: Yeah.

09:10:19 8 MR. COSTA: -- Your Honor. So it would just be
09:10:20 9 as to the individuals we're withdrawing.

09:10:22 10 THE COURT: You're withdrawing only as to the
09:10:24 11 individuals?

09:10:25 12 MR. COSTA: Exactly.

09:10:25 13 THE COURT: Oh. I thought you were withdrawing
09:10:26 14 entirely.

09:10:27 15 MR. COSTA: No. We're still right in the thick
09:10:29 16 of things here for Cassava. It's just the individual
09:10:33 17 defendants.

09:10:33 18 THE COURT: Well, I'm not kicking you out.

09:10:35 19 MR. COSTA: I appreciate that.

09:10:36 20 THE COURT: All right. So I am granting your
09:10:40 21 motion to withdraw with respect to the individuals.

09:10:50 22 MR. COSTA: Thank you.

09:10:50 23 THE COURT: Okay. This is a motion to stay.
09:10:55 24 Who's arguing?

09:10:57 25 MR. COSTA: It's our motion, Your Honor. We

09:10:59 1 did -- I know the Court had sent out a sealed request for
09:11:02 2 information about the status of discovery, et cetera.

09:11:06 3 THE COURT: Yeah. Unfortunately, there was a
09:11:08 4 mix-up in the clerk's office. And I was wondering why
09:11:12 5 nobody was responding, because we have very good law
09:11:16 6 firms here and not firms that would normally simply look
09:11:20 7 the other way. And, boom, we find out that it wasn't
09:11:24 8 your fault at all, it was the clerk's fault. And I
09:11:28 9 apologize for that. And so, yeah, I'd like to know the
09:11:33 10 status.

09:11:34 11 MR. COSTA: Right. And so -- and Ms. Loseman
09:11:41 12 is prepared to address that --

09:11:41 13 THE COURT: All right.

09:11:41 14 MR. COSTA: -- to start off.

09:11:44 15 MS. LOSEMAN: Good morning, Your Honor. May I
09:11:45 16 address you from here?

09:11:46 17 THE COURT: Yes.

09:11:46 18 MS. LOSEMAN: Thank you. We thought it would
09:11:49 19 be helpful, Your Honor, to start with an update on recent
09:11:52 20 events concerning the company and how those recent events
09:11:55 21 impact these proceedings. And these recent events really
09:12:01 22 have been very active and in development over the last
09:12:03 23 month and a half or so. Most of this is addressed in a
09:12:06 24 notice that we filed with Your Honor, but there have also
09:12:08 25 been additional updates that we'd like to bring to your

09:12:11 1 attention.

09:12:14 2 So first, Your Honor, on June 28th the Justice
09:12:16 3 Department announced that a grand jury in the U.S.
09:12:19 4 District Court of Maryland indicted a former consultant.

09:12:23 5 THE COURT: Yes. I was aware of that.

09:12:25 6 MS. LOSEMAN: Dr. Wang. This is an individual
09:12:27 7 that Plaintiffs have described as having particular
09:12:30 8 relevance to the allegations in their complaint.

09:12:32 9 And then on July 1st the company disclosed that
09:12:35 10 it was cooperating with the DOJ and the SEC regarding
09:12:40 11 ongoing investigations into the company as well as two
09:12:43 12 senior employees. Further, based on new information --
09:12:48 13 newly obtained information provided to Cassava by the
09:12:51 14 SEC, the company created an ad hoc investigation
09:12:56 15 committee of the board of directors, comprised of
09:12:59 16 individual independent members of the board of directors,
09:13:03 17 to conduct an investigation concerning that newly
09:13:06 18 obtained information, as well as the events in the DOJ
09:13:10 19 indictment.

09:13:12 20 We provided an update to the Court on July 8th.
09:13:15 21 Since then, just two weeks ago, on July 17th, the company
09:13:18 22 disclosed that its chief executive officer,
09:13:22 23 Mr. Remi Barbier, resigned from the company that day.
09:13:26 24 That resignation is effective September 13th. And until
09:13:29 25 that day he is serving in a nonexecutive capacity,

09:13:33 1 without duties or responsibilities at the company. He
09:13:36 2 also resigned from the board of the company effective
09:13:39 3 immediately.

09:13:40 4 The company also announced that
09:13:42 5 Dr. Lindsay Burns resigned from the company, effective
09:13:45 6 immediately, and those two defendants in this case of
09:13:48 7 course are now represented by new counsel.

09:13:51 8 Cassava is still currently to this day actively
09:13:56 9 engaged in efforts to cooperate with the government in
09:13:59 10 its investigations.

09:14:00 11 Now, Plaintiffs have informed us that they
09:14:03 12 intend to move for leave to amend or supplement their
09:14:07 13 complaint to account for these very recent developments.
09:14:12 14 They further inform us that they intend -- they are
09:14:15 15 considering when to file that motion because we are very
09:14:18 16 much in the middle of developing a set of circumstances
09:14:22 17 that Plaintiffs contend are relevant to the claims in
09:14:26 18 their complaint.

09:14:27 19 And I'll get to the significance of that in a
09:14:30 20 moment. Let me now turn to the status of discovery and
09:14:33 21 what Defendants have been doing to engage in discovery
09:14:36 22 and its efforts to comply with the Court's scheduling
09:14:39 23 order.

09:14:40 24 And I'm going to try to address the items in
09:14:43 25 the sealed order that we obtained a photo of courtesy of

09:14:47 1 Plaintiffs' counsel last evening. So item 1 of the
09:14:50 2 sealed order, first and foremost, to address the
09:14:54 3 mischaracterization in Plaintiffs' submissions that
09:14:56 4 Defendants are somehow not fully participating in the
09:14:59 5 discovery process, by the time Gibson, Dunn appeared in
09:15:04 6 the case in February of this year, the company had
09:15:07 7 already produced over 300,000 documents to Plaintiffs.
09:15:12 8 With a substantial completion deadline of April 15th
09:15:15 9 around that time, we immediately undertook to review and
09:15:20 10 keep that ongoing review of documents that were
09:15:23 11 potentially responsive to Plaintiffs' nearly 140 requests
09:15:27 12 for production, keep that process moving.

09:15:29 13 We provided a comprehensive response to
09:15:33 14 Plaintiffs' proposed search parameters and agreed to
09:15:36 15 review numerous categories of documents on March 15th.

09:15:40 16 Over the course of those months, consistent
09:15:43 17 with that agreement, we completed a review of
09:15:45 18 approximately 100,000 additional documents. And by April
09:15:50 19 15th we produced the responsive, nonprivileged documents
09:15:54 20 identified from that review, approximately 20,000
09:15:57 21 documents.

09:15:57 22 But days before that substantial completion
09:16:01 23 deadline, so approximately April 10th, after we had sent
09:16:04 24 a comprehensive response to Plaintiffs' discovery demands
09:16:09 25 or proposal, on April 10th, a month later, Plaintiffs

09:16:13 1 responded and indicated they disagreed with our
09:16:16 2 counterproposal and indeed wanted more searches
09:16:19 3 conducted.

09:16:20 4 Even though the substantial completion deadline
09:16:23 5 was just days away and had effectively passed at that
09:16:26 6 point, we engaged with Plaintiffs in good faith. And
09:16:30 7 this now will address part 3 of the sealed order,
09:16:32 8 Your Honor, the additional documents Plaintiffs argue
09:16:35 9 Defendants have somehow refused to produce.

09:16:37 10 After applying search terms and further
09:16:41 11 conferring with Plaintiffs, following up on that
09:16:43 12 April 10th correspondence, on May 20th we reached
09:16:47 13 agreement. We agreed to review an additional 35,000
09:16:50 14 documents hitting on various additional terms.

09:16:53 15 On June 18th we agreed to review an additional
09:16:57 16 25,000 documents, accompanying even -- or as the result
09:17:01 17 of agreeing to additional search terms. And on July 26th
09:17:04 18 we completed that review of those additional documents
09:17:08 19 and produced another 10,000 documents that were
09:17:11 20 responsive to Plaintiffs' request for documents.

09:17:14 21 So, in sum, we have reviewed well over 100,000
09:17:18 22 documents since we were engaged as counsel in February
09:17:21 23 and produced nearly 30,000 in addition to the 300,000
09:17:25 24 that had already been produced.

09:17:27 25 As to the subpoenas issued to the board

09:17:30 1 members -- and this is part of item 3 in the sealed
09:17:32 2 order, Your Honor -- in parallel with the company's
09:17:35 3 ongoing review of documents that I just described, we
09:17:39 4 also collected from the individual directors, collected
09:17:44 5 materials from them and conducted review of those
09:17:47 6 materials. That production was completed on May 6th of
09:17:50 7 this year.

09:17:50 8 So, in short, the pending motion to stay that
09:17:54 9 Defendants have filed has had no impact on the document
09:17:58 10 discovery that has occurred in earnest over the last
09:18:01 11 several months. The only things that we have not
09:18:05 12 produced to date, aside from engaging with brand-new
09:18:09 13 discovery requests we received just two weeks ago -- and
09:18:11 14 I'll get to that in a moment -- there are just three
09:18:14 15 items. And this is in response to item 2 of Your Honor's
09:18:17 16 sealed order.

09:18:18 17 The first category is of course documents
09:18:21 18 withheld for privilege. When we finished our document
09:18:24 19 review last week, we began the process of preparing a
09:18:28 20 privilege log. There are approximately 4500 documents
09:18:32 21 that were withheld on the basis of privilege. We are
09:18:35 22 finalizing that log and the descriptions of those
09:18:39 23 documents that were withheld.

09:18:40 24 The second category, transcripts of SEC
09:18:43 25 testimony. Your Honor, we have not produced those

09:18:45 1 because we do not have them. We have made the request of
09:18:48 2 the SEC for copies of the transcripts. They sent us a
09:18:52 3 copy of the order form. That form requires us to make a
09:18:56 4 representation that we simply cannot make, that we will
09:18:59 5 not further disseminate a copy of that transcript. So we
09:19:04 6 put the Plaintiffs in direct contact with the SEC. That
09:19:08 7 can hardly be described as Defendants failing to
09:19:11 8 participate fully in the discovery in this case.

09:19:14 9 The third category of documents that we have
09:19:18 10 not produced, that's copies of communications with the
09:19:22 11 government, including four presentations previously made
09:19:26 12 to the government subject to privilege.

09:19:28 13 We did not produce those limited categories of
09:19:31 14 documents and, instead, brought those matters to the
09:19:36 15 attention of the Court in filing the motion to stay and
09:19:38 16 opposing the motion to compel. That is it. That is it.

09:19:42 17 This can hardly be described, not producing
09:19:46 18 those three limited categories of documents, as not fully
09:19:49 19 engaging in discovery in this proceeding.

09:19:52 20 On the interrogatories -- this is item 4 of
09:19:56 21 Your Honor's sealed order -- and why Defendants have not
09:19:58 22 answered Plaintiffs' interrogatories. First, Your Honor,
09:20:02 23 both Plaintiffs and Defendants have served
09:20:05 24 interrogatories on the other side in this proceeding.

09:20:07 25 Plaintiffs have refused to answer any

09:20:10 1 interrogatories that Defendants have served on the
09:20:13 2 grounds that they are contention interrogatories and
09:20:16 3 should not be answered until the end of the discovery
09:20:18 4 process.

09:20:19 5 Now, Plaintiffs served Cassava with four
09:20:22 6 interrogatories, the first three of which contained
09:20:25 7 nearly 100 subparts, nearly. We answered the first
09:20:30 8 interrogatory, including all 36 subparts of that
09:20:34 9 interrogatory. We objected to the remaining
09:20:37 10 interrogatories as exceeding the limits in Rule 33.

09:20:40 11 Now, as part of an agreement regarding the
09:20:43 12 overall number of interrogatories and requests for
09:20:46 13 admission that is appropriate in this case, an agreement
09:20:49 14 that we reached in late June with Plaintiffs, we have
09:20:52 15 agreed to answer the pending interrogatories. But
09:20:55 16 Plaintiffs still refuse to answer any of our
09:20:58 17 interrogatories, again, on grounds that they are
09:21:01 18 contention interrogatories.

09:21:04 19 We are still amenable to answering
09:21:07 20 interrogatories 1 through 3. And, indeed, we are in the
09:21:09 21 process of drafting those very detailed responses. But
09:21:12 22 Plaintiffs' fourth interrogatory is a contention
09:21:15 23 interrogatory, and we will object on the same grounds as
09:21:18 24 Plaintiffs have in answering that interrogatory.

09:21:21 25 Now, that all brings me, Your Honor, to the

09:21:25 1 last topic, which is depositions in this case and the
09:21:29 2 scheduling order. The tone of Plaintiffs' status
09:21:32 3 conference requests, and even their submission of late
09:21:35 4 last evening, seems to suggest that Defendants have
09:21:38 5 somehow delayed their ability to begin taking testimony
09:21:42 6 from witnesses in this matter.

09:21:44 7 But, Your Honor, they could have deposed any
09:21:47 8 witness. They could have deposed witnesses over the last
09:21:50 9 couple of months and then later sought leave from the
09:21:54 10 Court to take additional testimony outside of the single
09:21:57 11 seven-hour day the rule permits. They didn't do that.

09:22:01 12 And we think, Your Honor, we understand why
09:22:03 13 they have not done that: Because Plaintiffs intend to
09:22:07 14 move to supplement their complaint. This story has not
09:22:11 15 yet completely unfolded, and Plaintiffs do not want to
09:22:15 16 risk taking a deposition now and not having the
09:22:18 17 opportunity to depose witnesses later about developments
09:22:21 18 that are literally unfolding as we speak.

09:22:24 19 On July 1st Defendants filed the notice of
09:22:28 20 developments related to the motion to stay. Just a week
09:22:32 21 later, Plaintiffs filed their request for this status
09:22:35 22 conference. And just a little over two weeks after that,
09:22:39 23 and on the deadline to move to supplement or to amend the
09:22:42 24 complaint, that's when Plaintiffs informed Defendants for
09:22:45 25 the first time they intended to seek leave to amend the

09:22:49 1 complaint and expand the scope of this case to capture
09:22:53 2 events that are unfolding right now.

09:22:55 3 They have not noticed depositions, not because
09:22:58 4 Defendants have somehow delayed, but, instead, because
09:23:01 5 they don't want to risk deposing a witness too early.
09:23:05 6 And, frankly, Your Honor, that -- that makes some sense
09:23:08 7 to us. That actually makes some sense in terms of
09:23:14 8 economically and efficiently prosecuting these claims and
09:23:18 9 defending these claims.

09:23:19 10 The parties have discussed the number of
09:23:21 11 witnesses they anticipate, and they number, Your Honor,
09:23:24 12 in the dozens. It makes no sense. It would only
09:23:27 13 needlessly drive up costs to depose witnesses now, only
09:23:31 14 to seek leave to recall them and depose them again early
09:23:34 15 next year.

09:23:35 16 We propose, Your Honor, that the Court -- after
09:23:38 17 the court has an opportunity to hear argument on the
09:23:41 18 motion to stay and resolves that motion, that the parties
09:23:45 19 meet and confer to work on a proposed amended scheduling
09:23:49 20 order that permits the parties and the Court the time it
09:23:52 21 needs to account for these recent developments, time to
09:23:56 22 develop a deadline to file a motion to supplement the
09:23:58 23 amended complaint, time -- a deadline to account for the
09:24:06 24 impact those amendments will have to the pending motion
09:24:08 25 to certify the class, and the impact of those proposed

09:24:11 1 amendments we believe are quite substantial on the motion
09:24:14 2 to certify the class.

09:24:15 3 So our proposal would be, after the motion to
09:24:19 4 stay is resolved that the parties meet and confer and
09:24:22 5 develop a workable schedule for the rest of this
09:24:24 6 proceeding.

09:24:25 7 Your Honor, if you have no other questions, I
09:24:27 8 believe I've addressed the --

09:24:29 9 THE COURT: Yes. I don't.

09:24:30 10 MS. LOSEMAN: Thank you.

09:24:35 11 THE COURT: Yeah. What's going on here? I
09:24:37 12 keep hearing a beep.

09:24:46 13 Let me tell you what my thoughts are before we
09:24:50 14 get into the -- if we get into the actual merits argument
09:24:56 15 of the motion to stay. The reason Judge Pitman asked me
09:25:08 16 to handle this case was because he was aware that I have
09:25:11 17 handled complex litigation all over the country and that
09:25:20 18 I have some experience in dealing with very complex SEC
09:25:28 19 type cases, as well as other complex cases. And this
09:25:35 20 case is most certainly a complex case, under any rubric
09:25:45 21 one might employ in their definition.

09:25:51 22 It is not unusual in these cases, particularly
09:25:58 23 where we have a situation of potential, if not real,
09:26:06 24 criminal indictment, that there are motions to stay,
09:26:13 25 motions to limit, disputes involving the Fifth Amendment

09:26:22 1 or the potential Fifth Amendment. Of course, the company
09:26:26 2 doesn't have a Fifth Amendment right, but the individuals
09:26:28 3 do, and the individuals are the ones that control the
09:26:32 4 company.

09:26:32 5 Certainly from the perspective of the
09:26:39 6 plaintiffs, they want to attempt to get as much
09:26:45 7 information as they possibly can prior to somebody being
09:26:50 8 indicted and then shutting down entirely. On the other
09:26:55 9 hand, the defense has a legitimate concern that they will
09:27:04 10 be forced to provide information which might otherwise be
09:27:11 11 privileged.

09:27:16 12 So the fact that you have run into this dispute
09:27:27 13 with parties refusing to answer, parties attempting to --
09:27:33 14 the allegation that parties are not answering, we've got
09:27:36 15 it going both ways here, and that is absolutely not
09:27:44 16 unusual. It's very reminiscent of a case I handled in
09:27:51 17 Chicago involving railroads and disputes and all of that.

09:27:55 18 What I would -- first of all, what I need to
09:28:00 19 know is whether indeed the Plaintiffs intend to file a
09:28:08 20 motion to amend their complaint. I mean, is that what
09:28:14 21 you intend to do?

09:28:15 22 MR. LAVELLE: May I, Your Honor?

09:28:16 23 THE COURT: Yeah.

09:28:22 24 MR. LAVELLE: Kevin Lavelle from Robbins Geller
09:28:25 25 for Plaintiffs.

09:28:26 1 It is our intention to supplement the
09:28:28 2 complaint. We e-mailed --

09:28:30 3 THE COURT: Well, when you say "supplement,"
09:28:32 4 you mean you intend to file an amended complaint.

09:28:35 5 MR. LAVELLE: Yes.

09:28:36 6 THE COURT: You can't just supplement your
09:28:38 7 complaint.

09:28:39 8 MR. LAVELLE: Yeah. I think, you know, under
09:28:40 9 the federal rules there are rules for amending and
09:28:42 10 supplementing. Supplementing the complaint usually
09:28:45 11 involves --

09:28:46 12 THE COURT: But not under these circumstances,
09:28:48 13 because we have -- this would be an amended complaint,
09:28:54 14 essentially.

09:28:55 15 MR. LAVELLE: I think this would be -- I think
09:28:55 16 this would still be called a supplemented complaint,
09:28:58 17 because we have our complaint and we're adding events
09:29:00 18 that occurred after the events of the amendment.

09:29:02 19 THE COURT: Oh, I see what you're saying.

09:29:05 20 Okay. All right. I misunderstood. I thought you were
09:29:07 21 adding parties.

09:29:08 22 MR. LAVELLE: No. We're not adding parties.
09:29:09 23 We're adding events.

09:29:09 24 THE COURT: Or removing parties. I don't know.

09:29:10 25 MR. LAVELLE: We're not removing parties.

09:29:12 1 THE COURT: I don't get to go -- I'm not
09:29:14 2 sitting in your deliberations.

09:29:16 3 MR. LAVELLE: Sure. And we sent over a draft
09:29:19 4 of our amendment, or our supplement, to the defendants
09:29:24 5 about two weeks ago. We still haven't received their
09:29:27 6 position on it. We're hoping to meet and confer as soon
09:29:32 7 as possible about what their position actually is on that
09:29:35 8 supplement.

09:29:36 9 But, yes, as defense counsel mentioned, there
09:29:39 10 have been numerous events, three in particular, that
09:29:43 11 occurred between July 28th and -- sorry -- June 28th and
09:29:48 12 July 17th that we are intending to supplement the
09:29:52 13 complaint with to add them as corrective disclosures.

09:29:58 14 THE COURT: Okay.

09:29:58 15 MR. LAVELLE: In other words, after those
09:29:59 16 events came out, the news --

09:29:59 17 THE COURT: So you're not adding any new
09:30:02 18 claims?

09:30:03 19 MR. LAVELLE: No.

09:30:03 20 THE COURT: No. All right. Okay. Well, you
09:30:05 21 wouldn't be amending the complaint, then. All right.
09:30:08 22 Fine. Okay. Thank you.

09:30:11 23 MR. LAVELLE: Sure.

09:30:12 24 THE COURT: All right. Here is -- I'll tell
09:30:16 25 you first what my initial thoughts were on this, and I'm

09:30:20 1 going to tell you why I'm parking the car, so to speak,
09:30:25 2 for a moment. Initially looking at this, my feeling was
09:30:34 3 that I should deny the motion and have discovery go
09:30:38 4 forward, principally because -- well, I won't get into
09:30:46 5 it -- for a whole host of reasons.

09:30:49 6 However, in thinking about this very carefully
09:30:53 7 last night -- and, actually, what counsel indicated to me
09:30:56 8 today, both counsel, have simply reinforced my concern --
09:31:06 9 what I am going to do is put the brakes on discovery for
09:31:10 10 a period of one month. It may extend, it may not.

09:31:19 11 But what I want to do is to give what I thought
09:31:25 12 was going to be an amended complaint, but now is a
09:31:28 13 supplement, but, nonetheless, it does change the
09:31:32 14 landscape to a degree, of which they are aware. Not a
09:31:37 15 great degree, but it does change the landscape.

09:31:40 16 MR. LAVELLE: May I address that, Your Honor?

09:31:41 17 THE COURT: Yeah.

09:31:42 18 MR. LAVELLE: So, you know, from our --
09:31:44 19 Plaintiffs' perspective, it does not really change the
09:31:47 20 landscape that much. We're simply tacking on events that
09:31:53 21 caused Cassava's stock price to drop that we intend to
09:31:58 22 claim as corrective disclosures.

09:32:00 23 THE COURT: Well. But we're here because
09:32:03 24 Cassava's stock price dropped.

09:32:05 25 MR. LAVELLE: Correct.

09:32:06 1 THE COURT: I mean, that's the whole gravamen
09:32:07 2 of this case, right?

09:32:08 3 MR. LAVELLE: That is correct, Your Honor.

09:32:09 4 THE COURT: All right. So I understand what
09:32:10 5 you're saying. I am not unmindful. I understand what
09:32:14 6 you're saying. You can be seated. Thank you.

09:32:18 7 What I also intend to do is something I don't
09:32:21 8 do often, but I will do in this case because I think it's
09:32:24 9 absolutely necessary. I understand that we have very
09:32:27 10 good lawyers on both sides of this case. You're
09:32:32 11 experienced, and you're experienced in this area of the
09:32:35 12 law. And that is very helpful to me.

09:32:42 13 On the other hand, there's always a -- you
09:32:51 14 know, we always say there's a silver lining in every dark
09:32:54 15 cloud. Well, there's a dark cloud in every silver
09:32:57 16 lining. And that is, because the lawyers are so
09:32:59 17 experienced, they know their way around this area, and
09:33:04 18 there are many ways in which we can get gummed up, so to
09:33:13 19 speak.

09:33:14 20 So what I intend to do is appoint one of the
09:33:17 21 magistrate judges -- and I haven't figured out which one
09:33:21 22 yet -- as a discovery master in this matter. Huh?

09:33:26 23 THE CLERK: I think it's Hightower. She's been
09:33:29 24 doing all of the referred motions.

09:33:33 25 THE COURT: All right. I will have Judge

09:33:35 1 Hightower -- now, you say, well, why appoint somebody as
09:33:38 2 a discovery master if they're already the magistrate
09:33:40 3 judge. Because it gives them additional brief, if you
09:33:50 4 will, additional authority, to work with counsel to -- to
09:33:56 5 tailor discovery, to avoid problems, and to give you,
09:34:05 6 if -- if I may, a preview of where you might get into
09:34:11 7 problems or avoid problems.

09:34:14 8 Now, sometimes I'll appoint a magistrate judge
09:34:20 9 who is not the actual magistrate so that we don't have
09:34:25 10 then a problem of an appeal from a magistrate's decision
09:34:31 11 and somebody say, well, wait a minute, they participated
09:34:33 12 in that decision. You see what I'm saying here?

09:34:37 13 So I haven't figured that one out. I'll ask
09:34:40 14 your input on that. Because, if I have a -- a discovery
09:34:48 15 master that's working with you and you reach a
09:34:51 16 conclusion, and one side doesn't either agree with it or
09:34:56 17 the magistrate says, well, this is what I think ought to
09:35:00 18 happen, they don't agree and they want to appeal, they
09:35:03 19 would appeal to the magistrate. Well, the magistrate
09:35:08 20 judge is the discovery master. So that doesn't work
09:35:13 21 well.

09:35:14 22 So what I may do is ask one of the other
09:35:19 23 magistrate judges here or possibly even, with your
09:35:24 24 consent, from San Antonio to assist you, because you're
09:35:29 25 from where?

09:35:30 1 MR. LAVELLE: San Diego, California.

09:35:32 2 THE COURT: And you're from Houston.

09:35:34 3 MR. COSTA: Correct. And Denver.

09:35:36 4 THE COURT: So the difference between you going

09:35:40 5 to San Antonio and coming to Austin is not that dramatic.

09:35:45 6 And I was thinking of possibly Judge Bemporad, who is our

09:35:49 7 most experience magistrate judge in San Antonio and

09:35:52 8 highly respected, as being your discovery master in this

09:35:59 9 case. And then just leave Judge Hightower as the

09:36:03 10 magistrate judge on this case for contested matters so

09:36:08 11 that we avoid the problem of the circumstance which I was

09:36:15 12 talking about.

09:36:19 13 Now, this is -- this is something that I came

09:36:24 14 up with. I am not some sort of vizier here. I could

09:36:34 15 well be missing something that counsel sees or creating

09:36:39 16 an additional problem for you that you don't want. But

09:36:42 17 I'm trying to see if we can't expedite this and avoid the

09:36:56 18 kinds of conflicts that I've often seen in these cases by

09:37:00 19 actually having somebody in there, a neutral in there,

09:37:03 20 who doesn't hold a brief for either party.

09:37:05 21 Because, look, you're counsel for your clients,

09:37:09 22 and you're -- when you meet, you're advocating your

09:37:13 23 client's position. If we had a neutral in there -- it's

09:37:16 24 almost like a mediator. Had a neutral in there to help

09:37:19 25 you work this out, it might well be helpful. And it

09:37:25 1 doesn't cost 15 cents, so we're not adding to the
09:37:29 2 litigation.

09:37:29 3 I'm not going out and saying, well, listen I
09:37:33 4 want you to find the most expensive lawyer in Austin,
09:37:36 5 Texas and hire them and you'll split the cost. I'm not
09:37:40 6 trying to do that; I don't want to do that. And I'm
09:37:43 7 trying to think of somebody who would be highly respected
09:37:48 8 and who is perfectly capable of doing this.

09:37:55 9 And all of you -- well, all of you don't know.
09:38:01 10 Judge Costa certainly knows, and those of you who were
09:38:04 11 from Texas will know Judge Bemporad, but you may not.
09:38:09 12 But he is a very highly qualified and highly -- and he's
09:38:15 13 our most senior magistrate judge, by the way, to my
09:38:18 14 knowledge.

09:38:19 15 Now, does -- I would love to have your input as
09:38:22 16 to whether you think this is a bad idea or a good idea.
09:38:31 17 And don't argue to me about the one month, because that's
09:38:34 18 going to happen. Okay? I think we need a pause here. I
09:38:38 19 need to -- I want you to file your supplement, I want
09:38:41 20 them to get it, and then we'll see where we are.

09:38:48 21 So I'm going to deny the -- I'm going to grant
09:38:51 22 the request for stay for one month, okay? That's what's
09:38:54 23 happening. And then we will go from there.

09:38:59 24 So does anybody have any -- Mr. Costa. It's so
09:39:05 25 hard for me to call you Mr. Costa because I've always

09:39:07 1 known you as Judge Costa.

09:39:09 2 MR. COSTA: There's only one judge in this
09:39:10 3 courtroom, so Mr. Costa is the right way to do it. I
09:39:12 4 understand that one-month pause which I think is helpful.
09:39:15 5 Does that mean will the motion to stay, then, still be
09:39:20 6 considered and can we still press that?

09:39:24 7 THE COURT: What I'm going do is I will decide
09:39:26 8 it for one month. And then at the end of when we -- when
09:39:31 9 you get -- I mean, you can decide whether you need to
09:39:32 10 file it again after you get together with -- if we have
09:39:38 11 the discovery master. After you get together with the
09:39:40 12 discovery master, whether it's necessary. That's why I
09:39:44 13 want the month, is to give Judge Bemporad and yourselves
09:39:49 14 an opportunity to get together.

09:39:50 15 I mean, every lawyer in this room doesn't need
09:39:52 16 to come. I mean, you can decide who you wish to have.
09:39:59 17 Obviously, one lawyer from each party needs to be there
09:40:04 18 at least. But I'm not going to tell you who to bring or
09:40:07 19 who not to bring.

09:40:08 20 MR. COSTA: Understood. And regardless of our
09:40:10 21 motion to stay, a discovery master could be appointed
09:40:14 22 because, even our motion is saying class cert. discovery
09:40:18 23 should go forward.

09:40:19 24 THE COURT: Right.

09:40:19 25 MR. COSTA: There's actually a deposition next

09:40:20 1 week, and --

09:40:20 2 THE COURT: I'm not staying that. That's not
09:40:22 3 being stayed. I'm staying only what you've asked to be
09:40:24 4 stayed.

09:40:25 5 MR. COSTA: Okay. Right. So we would, then,
09:40:28 6 it sounds like, have an opportunity to reassert the
09:40:30 7 motion to stay.

09:40:30 8 THE COURT: Absolutely.

09:40:31 9 MR. COSTA: Because, you know, we thought it
09:40:33 10 was strong when we filed it, but it's grown even stronger
09:40:37 11 because some of the developments we shared, including the
09:40:38 12 indictment.

09:40:38 13 THE COURT: You can reassert that motion at the
09:40:40 14 appropriate time, if it's necessary to reassert it.
09:40:43 15 Because what may be worked out may alleviate all or even
09:40:49 16 part of it. So, yeah, absolutely.

09:40:52 17 MR. COSTA: Understood.

09:40:53 18 THE COURT: What I want to do here, I think,
09:40:58 19 does not severely prejudice anybody. I mean, I
09:41:02 20 understand that -- that the plaintiffs want to go
09:41:05 21 tomorrow, and they want go through all their discovery.
09:41:08 22 You know, I am fully aware of that. But I think we do
09:41:12 23 need to push the pause button here briefly. I want to
09:41:17 24 get this discovery master on board. And I want to have
09:41:22 25 you meet with the discovery master, see where you are,

09:41:26 1 and then -- and then to be, quite frankly, I want --
09:41:30 2 you're going to have to help educate the discovery master
09:41:33 3 in this case, because they're coming from nowhere.

09:41:36 4 I mean, I know the case because I've been, you
09:41:40 5 know, involved with it. But if it's Judge Bemporad, he
09:41:46 6 would not know it. I mean, I don't know. He maybe going
09:41:49 7 on a month vacation. Heaven knows. So it may end up not
09:41:53 8 being Judge Bemporad. I know that Judge Pitman is headed
09:41:56 9 off to Spain Monday, and so I'm going to spend even more
09:42:03 10 time here than I normally do.

09:42:04 11 Yes?

09:42:07 12 MR. LAVELLE: So we don't oppose a discovery
09:42:12 13 master. We were actually going to suggest something
09:42:14 14 similar, so we're on board with that.

09:42:16 15 With regards to the one-month stay, just a
09:42:19 16 clarifying question, so that's only as to fact discovery.

09:42:23 17 THE COURT: Yeah. That's right. It's only as
09:42:26 18 to what they've asked for, not the other discovery.

09:42:29 19 MR. LAVELLE: And so we just have one follow-up
09:42:31 20 clarifying question. There was a mention of a privilege
09:42:36 21 log for documents that are being withheld from past
09:42:39 22 discovery that we've already prepared.

09:42:42 23 THE COURT: Right.

09:42:43 24 MR. LAVELLE: I think we would just want to
09:42:44 25 clarify that that would still be produced on the same

09:42:47 1 schedule that Defendants were suggesting and not be.

09:42:50 2 THE COURT: That's a log. It's just a log.

09:42:51 3 It's not the documents. Am I right?

09:42:53 4 MR. LAVELLE: That's right.

09:42:58 5 MR. COSTA: Yeah. We'll complete that and

09:43:00 6 produce that within a couple of weeks.

09:43:02 7 THE COURT: All right. That will be fine.

09:43:03 8 MR. COSTA: That won't be affected by the stay.

09:43:05 9 THE COURT: All right. Thank you, Mr. Costa.

09:43:07 10 Okay. So I am not going hear any argument

09:43:10 11 today above and beyond where we are. But I do think it

09:43:14 12 was very important for us to get together and discuss

09:43:17 13 this so we can find out where we're going here. I mean,

09:43:24 14 I don't know whether this case will ultimately settle.

09:43:27 15 It may or may not. But I have to proceed on the theory

09:43:33 16 that it won't and that we're going to trial, and so we

09:43:44 17 have to prepare that way.

09:43:45 18 Now, is there anything else anybody else would
09:43:48 19 like to place on the record?

09:43:52 20 MR. DROSMAN: Just one question, Your Honor.

09:43:53 21 THE COURT: Sure. You want to --

09:43:59 22 MR. DROSMAN: My name is -- should I come up to
09:43:59 23 the podium?

09:43:59 24 THE COURT: No. You don't need to, but you
09:43:59 25 need to identify yourself.

09:43:59 1 MR. DROSMAN: Of course. Daniel Drosman on
09:44:01 2 behalf of Plaintiffs.

09:44:01 3 So I guess I just have one clarifying question
09:44:04 4 about the supplementation. You had said that the
09:44:09 5 plaintiffs, we should go ahead and put that on file, file
09:44:14 6 our supplemented complaint. And I guess my concern is,
09:44:16 7 because events have been coming sort of fast and
09:44:19 8 furiously, that we had thought it might be more prudent
09:44:23 9 to wait a little bit to see whether there are additional
09:44:27 10 shoes to drop before we file that supplementation.

09:44:31 11 Given that, would you still like us to file a
09:44:32 12 supplemented complaint now?

09:44:33 13 THE COURT: No. Maybe -- well, I'm sure the
09:44:36 14 defendants would like you to file it so they know what's
09:44:39 15 going on. But I think they have a pretty good idea.

09:44:43 16 MR. DROSMAN: We provided a draft of the
09:44:45 17 supplementation.

09:44:46 18 THE COURT: That's the kind of cooperation, by
09:44:50 19 the way, I like to see that I don't always see.

09:44:52 20 Listen, I'm old enough to have practiced law as
09:44:59 21 a trial lawyer when it was hide the ball, and that was
09:45:05 22 not -- that was not good. I remember spending my first
09:45:12 23 week after I got out of the military, being shipped off
09:45:16 24 to Chicago in the bowels of the Libby, McNeill and Libby
09:45:23 25 offices going through thousands of documents with a Bates

09:45:28 1 stamp, looking for hidden gems that might have been stuck
09:45:33 2 in some kind of a crevice somewhere in some stupid file
09:45:40 3 that meant nothing. That's what used to happen in the
09:45:43 4 old days. It did. Some of the older lawyers, they'll
09:45:46 5 remember that. And it was not pleasant.

09:45:51 6 I would look out the window at the Art
09:45:53 7 Institute of Chicago across the way, and I would think to
09:45:58 8 myself, wow, I sure wish I was over there. I don't know
09:46:01 9 how many Bates stamps I broke. Thank goodness we don't
09:46:08 10 have that anymore. That was awful.

09:46:11 11 So I will get an order out. What I would
09:46:18 12 like -- I usually do 100 percent my own orders. But,
09:46:22 13 because of the nature of this, I'm going to ask that
09:46:25 14 counsel prepare a draft order jointly for my
09:46:33 15 consideration. I normally don't do that. In fact, I
09:46:36 16 can't remember the last time I've done that. Never.

09:46:40 17 But in this case, because of the nature of it
09:46:45 18 and because you've had so many discussions among
09:46:48 19 yourselves that I'm not privy to, I'm a little concerned
09:46:52 20 that might step on something. And you just -- for
09:46:56 21 instance, you just brought a great point up. I would
09:46:59 22 actually prefer that you hold off until you met with the
09:47:04 23 discovery master. And by that time, which I'm hoping
09:47:08 24 will be within the next week or two -- and I may end up
09:47:12 25 extending this. I've said a month. It may end up being

09:47:16 1 a month and a half if you're unable to get to the
09:47:20 2 discovery master soon enough so that it makes a
09:47:22 3 difference. And I'll get that cue from the discovery
09:47:26 4 master, okay?

09:47:30 5 MR. DROSMAN: Thank you, Your Honor.

09:47:30 6 THE COURT: I think it will be Judge Bemporad.
09:47:32 7 He doesn't know about this. He's not going to be happy.
09:47:39 8 But he's the first guy I'm seeing. Those of you who
09:47:43 9 don't know him, he's a very tall guy, very imposing. I'm
09:47:49 10 six feet tall, and I'm looking up at him. I hope he
09:47:54 11 treats me well.

09:47:55 12 In any event, he's used to -- he was the
09:48:07 13 federal defender -- as some of you probably know, he was
09:48:13 14 the federal defender for the Western District of Texas.
09:48:15 15 But he knows civil law. He is very well educated. He
09:48:18 16 had a good legal education. And he is -- he is very,
09:48:23 17 very capable.

09:48:24 18 So I would like to have you submit a draft
09:48:32 19 order that you can both agree upon -- and if you can't
09:48:35 20 agree upon, let me know what you don't agree upon -- by,
09:48:43 21 say, Tuesday? Is that enough time?

09:48:46 22 MR. COSTA: Of course, Your Honor.

09:51:02 23 THE COURT: We can go off the record for just a
09:51:50 24 second.

09:51:50 25 (Discussion off the record)

09:51:50 1 THE COURT: Okay. Well, thank you so very
09:51:51 2 much. I know that you wanted to argue this. You were
09:51:54 3 primed, you were ready.

09:51:58 4 MR. COSTA: We'll hold our fire for next time.

09:52:01 5 THE COURT: But I do think this is the right
09:52:03 6 way to go. I am looking -- I'm trying to take, if you
09:52:08 7 will, the long view of this case rather than just the
09:52:11 8 short view. And I want to set us on the right path so we
09:52:16 9 can get this case -- the plaintiffs the opportunity to
09:52:22 10 put their case on, the defense the opportunity to
09:52:25 11 properly defend it, and get all the discovery done.

09:52:29 12 This is an enormous amount of discovery, and
09:52:34 13 there's a lot of documents. And even though we're not
09:52:37 14 Bates-stamping them, or most of them, and they're on disk
09:52:41 15 and so forth, it's still a lot to go through and it's
09:52:46 16 going to take some time.

09:52:48 17 So I don't expect -- we don't even have a trial
09:52:52 18 date in this case, do we? No. Okay. Well, this is not
09:52:56 19 going to get tried in six months. That's for sure.

09:52:59 20 Okay. Well, thank you so very much. I do
09:53:03 21 really appreciate your cooperation, and I appreciate your
09:53:06 22 willingness to listen to my thoughts on this. And if
09:53:10 23 anything comes up that you would like to discuss with me,
09:53:15 24 please just get ahold of Ms. Springs. She'll make sure
09:53:19 25 that you have her phone number.

09:54:06 1 (Discussion off the record)

09:54:06 2 THE COURT: So thank you very much. At least

09:54:11 3 for the moment, this is one case where I don't have to

09:54:15 4 worry about a mandamus petition being filed.

09:54:18 5 Thank you so very much. Court stands in

09:54:23 6 recess. Have a good weekend.

09:54:23 7 (End of transcript)

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1 **UNITED STATES DISTRICT COURT**)

2 **WESTERN DISTRICT OF TEXAS**)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
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7 I certify that the transcript fees and format comply with
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10 WITNESS MY OFFICIAL HAND this the 14th day of August 2024.

11

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